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Idaho Supreme Court
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**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

Bryan Oliveros,

*Claimant, Appellant*

*vs.*

Rule Steel Tanks, Inc., *Employer*, and Pinnacle Risk Management, *Surety,*

*Defendants, Respondents*

SUPREME COURT NO. 45782

(Idaho Ind. Comm. No. 08-024772)

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

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1. **Permanent Partial Disability**: The Industrial Commission's determination of Claimant's permanent disability pursuant to Idaho Code § 72-435 is supported by substantial and competent evidence.

Permanent impairment (PPI) is an essential component of permanent disability (PPD).

The Commission's determination the Claimant suffered permanent partial disability (PPD) of 25% is supported by substantial and competent evidence.

2. **Retraining Benefits**: The Commission's decision denying retraining benefits pursuant to Idaho Code § 72-450 is supported by substantial and competent evidence.

3. **Partial Finger Prosthesis**: The Commission's order on this issue was final as of November 2, 2012, therefore appeal of this issue is not timely. (Claimant concedes this point and withdraws this issue from this appeal.)

## ARGUMENT

### 1. The Industrial Commission's determination that Respondents are entitled to a credit for benefits paid for permanent impairment as against their liability for permanent disability benefits is based upon a mistake of law.

It has long been the case in Idaho that benefits for permanent impairment are different that benefits for permanent disability:

> Under our compensation law, compensation is based upon loss of capacity to earn. This loss is measured by what a workman of the same class and grade could earn in the employment in which he was, under the conditions prevailing therein, before and up to the time of the accident. (Flynn v. Carson, 42 Ida. 141, 243 P. 818.) In the case of Kelley v. Prouty, 54 Ida. 225, 30 P. (2d) 769, speaking of the Act, we said: "But the general theory and spirit of the act, except for the specific indemnities set forth in sec. 43-1113, is to the effect that compensation is provided to make good the loss of the earning power or capacity to work on account of the injury. In other words, our compensation act is to the same effect as the laws of those states holding, as indicated in the above cited cases, that compensation is to be paid on account of disability or impairment of ability to work, or for loss of earning power, and not as indemnity for the loss of a member or physical impairment as such, except the indemnities specified in sec. 43-1113."

*Herman v. Sunset Mercantile Co*., 66 Idaho 47, 54, 154 P.2d 487, 490, (1944).

The Idaho Industrial Commission held that Respondents receive a credit for PPI benefits paid for a permanent impairment as against benefits for permanent partial disability, contrary to

this Court's holdings in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150, (2014), and *Davis v. Hammack Mgmt.*, 161 Idaho 791, 391 P.3d 1261, (2017). *R.* 213, 223 *Vol.* 2. Respondents argue that Claimant's reliance upon *Corgatelli* and *Davis* is misplaced, as those decisions have been "scrutinized and limited to their facts." Respondents argue that, in particular, the logic of *Corgatelli* and *Davis* have been limited to cases involving total and permanent disability pursuant to Idaho Code §72-408.

In pertinent part, *Corgatelli* states:

> Examining worker's compensation law as a whole, *Roe v. Albertson's Inc., 141 Idaho* 524, 528, 112 P.3d 812, 816 (2005), this Court finds that there is no statutory basis for the Commission to award Steel West a credit for permanent physical impairment benefits previously paid to *Corgatelli*. Idaho Code section 72-408, which awards the employee income benefits for permanent disability, only offers a deduction "on account of the waiting period." The current version of the statute provides for no other deductions. Notably, an earlier version of Idaho Code section 72-408, then-codified at Idaho Code section 72-310(a), allowed for a deduction for "partial disability" along with the waiting period deduction. I.C. §72-130(a) (1969); see also *Endicott v. Potlach Forests*, 69 Idaho 450, 452, 208 P.2d 803, 804 (1949). However, this statute was repealed in 1971 when the Legislature recodified Idaho's worker's compensation law. Ch. 124, §1, 1971 Idaho Sess. Laws 422, 424. Thus, the current version of Idaho Code section 72-408, which provides for the employee such as *Corgatelli* to receive total and permanent disability benefits, includes no deduction or credit for previously paid permanent impairment benefits in its award of disability benefits.
>
> The other relevant statute for the award of disability benefits, Idaho Code section 72-406(2), allows for a deduction of previously paid "permanent disability" benefits for an injury to any member or part of the Claimant's body from a new award of permanent disability benefits, but only if the new benefits are provided "to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease." I.C. §72-406(2). Although partial permanent disability benefits are calculated in relation to permanent physical impairment benefits, Idaho Code sections 72-427 to-429, partial permanent disability benefits and permanent physical impairment benefits are two separate forms of compensation. In this case, *Corgatelli* challenges Steel West's credit for permanent physical impairment benefits paid for the 2005 injury before any finding or award of a subsequent permanent disability. Therefore, Idaho Code section 72-406(2) offers no statutory basis for Steel West to receive a credit for previously paid permanent physical impairment benefits.

*  *  *

> Based on the above reasons, the Court finds that the Commission erred in awarding Steel West a credit of $11,964 for the permanent physical impairment benefits paid to *Corgatelli* in 2006 to 2007 for his 2005 back injury. The Court declines to rule on the validity of the other credited permanent physical impairment benefits which were conceded by *Corgatelli* on appeal.

*Corgatelli*, 157 Idaho 287, 292-293, 335 P.3d 1150, 1155-1156, (2014). Emphasis Supplied.

When *Corgatelli* was challenged in *Davis*, this Court followed up by stating:

> The credit disallowed in *Corgatelli* and the credit here both deprive an injured worker of benefits provided under the worker's compensation law. Because the Commission approved the Stipulation without statutory jurisdiction, depriving Claimant benefits to which he was entitled under the law, the Commission's order is void.

*Davis v. Hammack Mgmt.,* 161 Idaho 791, 796, 391 P.3d 1261, 1266, (2017).

Without a doubt, the Idaho Industrial Commission has sought to limit the impact of *Corgatelli* first by its decision in *Davis* (reversed on appeal), and then, when the IIC's decision in *Davis* was overturned, by the Commission's decision *Dickinson v. Adams County,* 2017 IIC 0007 (2017). Respondents rely upon this Court's decision in *Mayer v. TPC holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016) and *Dickinson* to ask rhetorically, "How, then, is it possible to reconcile the *Corgatelli/Davis* decisions and the *Mayer/Dickinson* cases? This question is easily answered. First, *Mayer* makes no mention of either C*orgttelli* or *Davis*. Presumably, this Court would have done so if it had intended to overrule the holdings in two cases of such recent vintage. Second, although Respondents claim, without citation to any authority, that *Corgatelli* and *Davis* have been distinguished by this Court in *Mayer*, such is not the case. Respondents presumably rely on the following footnote contained in *Mayer*, as that statute so states:

> However, the forerunner of Idaho Code section 72-428 was enacted in 1917, and since that time the Idaho Code has always referred to a disability award, not an impairment award. Although the term "impairment award" has crept into the vernacular of the workmen's compensation bar, Idaho's Workmen's Compensation

> Law only provides for an award of income benefits based on disability, not impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 3 n.5, 773 P.2d 269, 271 n.5 (1988) ("Income benefits payable under the Workmen's Compensation Law, with the exception of retraining benefits, I.C. § 72-450, are based upon disability, either temporary or permanent, but not merely impairment."). A "permanent impairment" as the definitions themselves make clear, is simply a component of a "permanent disability." I.C. §§ 72-422,-423. Thus, any final award made under Idaho's Workmen's Compensation Law is properly referred to as a disability award. *Fowler*, 116 Idaho at 3 n.5, 773 P.2d at 271 n.5 ("While in some cases the non-medical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the impairment rating."); see also *Woodvine v. Triangle Dairy*, 106 Idaho 716, 722, 682 P.2d 1263, 1269 (1984)."

*Mayer*, 227, 742. Emphasis supplied. The underlined language contained in the footnote makes it clear that income benefits include both income benefits for the permanent disability rating and income benefits for the impairment rating. Undoubtedly permanent impairment is a factor to be considered in evaluating permanent disability under I.C. § 72-425 as that statute so states. This must logically be so because a person without a permanent impairment would not be entitled to any permanent disability. However, because something is a factor to be considered in determining the extent of permanent disability, does not mean that it is subsumed within permanent disability, as this Court recognized in *Corgatelli* and *Davis*. If this were not the case, then the "matters to be considered" provided in section I.C. § 72-430(1) would include an accident victim's impairment rating. However, I.C. § 72-430(1) does not mention permanent impairment:

> §72-430 Permanent disability – Determination of Percentages – Schedule.
>
> Matters to be considered. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to limit the employee in procuring or holding employment, include the nature of the physical disablement the disfigurement if of a kind likely to limit the employee in procuring or holding employment the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease,

> consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, ..."

There is a big difference between stating that permanent impairment is a factor to be considered and concluding that it is subsumed within the extent of permanent disability. Consequently, this Court's footnote contained in *Mayer* does not distinguish or overrule either expressly or implicitly *Corgatelli* or *Davis*. Indeed, the footnote in *Mayer* says merely that a final award is "properly referred to as a disability award" categorically as a way to refer to both an award for permanent impairment combined with an award for permanent disability. In sum, this Court's opinions in *Corgatelli* and *Davis* have not been overruled by the footnote in *Mayer*.

**2. The Industrial Commission's determination of the extent of Claimant's permanent disability is based on mistakes of law and is not supported by substantial and competent evidence.**

The Industrial Commission erred as a matter of law by failing to consider Claimant's capacity for gainful employment, instead considering only the jobs that he held before his accident. The Commission considered Claimant's access to the labor market at the time of the hearing (which had increased due to Claimant's self-funded retraining), as without considering Claimant's labor market at the time of injury when he was still in high school. *Findings of Fact, Conclusions of Law, and Recommendation* at ¶¶2 and 3, and ¶20 and 21. *R.* 198, 202-203, *Vol.* 2. Respondents' contention and the Commission's holding are wrong on this point. This Court has held:

> "Access to a labor market is central to either method of demonstrating that a Claimant is totally and permanently disabled. Among the relevant non-medical factors the Commission must consider in determining a disability rating is "the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee . . .." *Id*. (quoting I.C. § 72-430(1))."

*Brown v. Home Depot*, 272 P.3d 577, 580, 152 Idaho 605, 608, (2012). There can be no assessment of loss of access to the labor market without comparing labor markets before and after an accident. This Court has stated:

> [T]he Commission ignored the plain wording of section 72-430, which requires that "all the personal and economic circumstances of the employee" be considered. This clearly includes a Claimant's personal and economic status as an undocumented immigrant. In addition, the plain language of section 72-425 states that the evaluation of permanent disability includes the appraisal of the "pertinent nonmedical factors [as] provided in section 72-430, Idaho Code." Thus, the Commission must consider all personal circumstances that diminish the ability of the Claimant to compete in an open labor market.

*Marquez v. Pierce Painting, Inc.*, 164 Idaho 59, 423 P.3d 1011, (2018). It follows that it is a Claimant's "ability to compete in an open labor market" that is central to the analysis required under IC 72-430(1) and not the Claimant's history of earnings in an "open labor market." There is an inconsistency in treating the Claimant as an individual inevitably bound to arise from the ashes of an industrial accident because he aspires to go to college, thereby assuming that he has such an earning potential vastly exceeding what could be earned in a fast-food job, and, at the same time, concluding that he has not lost anything because he has not demonstrated the potential to do anything other than work in a fast food restaurant.

The only testimony on Claimant's "ability to compete in an open labor market" was given by Claimant's vocational expert Douglas Crum. In his initial report, Mr. Crum stated, "At the time of the July 30, 2008, industrial injury, Mr. Oliveros was in very good health, capable of performing medium and heavy physical-demand activities requiring frequent to continuous use of the bilateral upper extremities for gross and fine work with his hands." *A.* 277. Obviously, Mr. Oliveros had the capacity for many more jobs than just working at a fast-food restaurant, even if they were unskilled. Mr. Crum concluded:

> Based on this analysis, considering Mr. Oliveros' pre-injury education, language skills, vocational skills, work history, and presumed pre-injury capacity for medium to heavy work it appears that Mr. Oliveros had access to approximately 7.3% of the jobs in the labor market. Repeating the above analysis by factoring in the functional limitations caused by amputation of all 4 fingers of Mr. Oliveros' dominant right hand, considering the restrictions given by Dr. Gross, it appears Mr. Oliveros has access to approximately 1.4% of the jobs in this labor market. This represents an 80% reduction in labor market access.
>
> * * *
>
> In my opinion, it does not make sense to use the time of injury wage Mr. Oliveros as a baseline for a pre and post-injury wage-earning capacity comparison. According to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately $28,763 for male high school graduates. The average wage for a male worker with a bachelor's degree is $50,916.

*A.* 277-278.

As discussed below, Claimant sought out and paid for retraining after Respondents denied his request for retraining. It does not make sense to measure the Claimant's loss of access to the labor market based solely upon his prior earnings as of the date of his accident, because he was still in high school. If a Claimant's labor market after retraining cannot be measured against his ability to "compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee" at the time of the injury, when he is still in school, then a young worker who has no work history but is a brilliant student with a full scholarship to MIT who has a severe traumatic brain injury that precludes all but non-skilled labor would have no permanent disability, but only permanent impairment. Such an analysis would make no sense, even if [1] the young worker were to receive benefits for permanent impairment but no benefits for permanent disability in a percentage equal to the rating for permanent impairment (the result adopted by the Commission here consistent with the Commission's apparent refusal to follow this Court's decisions in *Corgatelli* and *Davis*), or [2] if the young worker were to receive separate benefits for permanent

impairment and permanent disability (the result required by *Corgatelli* and *Davis*), because at the time of the accident the young worker had no work history with which to compare the permanent disability he suffered as a result of the traumatic brain injury.

It is in this light that this Court has held:

> Therefore, we hold that the relevant labor market for evaluating the non-medical factors under I.C. § 72-430 and in determining a Claimant's odd-lot worker status is the labor market at the time of the hearing.

*Brown*, Idaho at 609, P.3d at 581.

*Brown*, relied upon by the Respondents, is distinguishable from this case because it dealt with a comparison of the determination of labor markets at the time of hearing or immediately post-accident. In both instances permanent disability was measured against the Claimant's pre-injury labor market. In other words, *Brown* dealt with when permanent disability was measured, and this case deals with how it is measured.

**3. The Commission erred as a matter of law and abused its discretion in disregarding the opinions of Claimant's vocational expert.**

The testimony of Claimant's vocational expert, Douglas Crum (*A.* 250-269), was admitted at the second hearing in this case, along with his original report of November 16, 2009, and his updated report of April 7, 2016. Respondents argue that the Commission found Mr. Crum's opinions conclusory and of little benefit in evaluating Claimant's "present or probable future ability to engage in gainful activity." The issue is not what the Commission found, but whether there was substantial evidence upon which the Commission concluded that Claimant had suffered no permanent disability above impairment. *R.* 214, *Vol.* 2. The Commission abused its discretion in arbitrarily holding, as it did, that the Claimant had not demonstrated a loss of access to the labor market consistent with the uncontradicted and unimpeached testimony of Mr. Crum. This is particularly true because as a matter of law, that the opinion of an expert

may not arbitrarily be rejected. *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). The Commission was not free arbitrarily rejecting the uncontradicted and unimpeached testimony of Mr. Crum, as it did.

Mr. Crum's factual testimony laid the foundation for his opinions.

The Commission stated that it accepted Mr. Crum's factual testimony as true. *R*. 209, *Vol.* 2. Mr. Crum's factual testimony was as follows: Mr. Crum testified that from November 1987 through October 1994 he was employed by the Idaho Industrial Commission rehabilitation division is a field consultant. In that job, he worked with injured workers. He stayed on until October 1994 as a field consultant and office manager for the Boise office. From October 1994 to 1990 he worked as a private vocational rehabilitation consultant for Boise company called REHABworks. At that point, he transitioned to more forensic work and continued to do some job development and job site evaluation. From July 1999 to the time of his testimony Mr. Crum had been self-employed as a vocational consultant in private practice doing forensic work focusing on workers compensation cases. He works roughly 50/50% for defendants and Claimants. (*A*. 251) Mr. Crum's resume was admitted as Exhibit 14 at the 2017 hearing (*A*. 305-306.) Since 1999, Mr. Crume has been employed as a vocational rehabilitation consultant, working during 1994 as the office manager and field consultant for the Idaho Industrial Commission Rehabilitation Division.

Mr. Crum's November 16, 2009 report, *A*. 273-280, contained a detailed medical history, summarization of selected medical records, review of additional medical records showing no pre-existing physical limitations or chronic conditions affecting his activities other than the subject accident, educational history, work history, future educational plan, and analysis of his pre-and post-injury labor market access using the Boise Metropolitan statistical area labor

market, and his conclusion that Mr. Oliveros had access to 7.3% of the jobs in the labor market. These are matters of fact.

Based upon medical restrictions given by Dr. Gross Mr. Crum concluded that Claimant was left with access to approximately 1.4% of the jobs the labor market representing an 80% reduction in labor market access. These are calculated values based on the Boise Metropolitan statistical area labor market, and therefore matters of fact accepted as true by the Commission.

Mr. Crum evaluated Claimant's time of injury position at which year and seven dollars an hour on a full-time basis. Mr. Crum testified that did not make sense to use the time of injury wage for Mr. Oliveros as a baseline for pre-and post-injury wage-earning capacity because based on U.S. Census department statistics for 2000 for the average wage price school graduate was approximately $28,763 for mail and the average rate for a male worker with a bachelor's degree was $50,916. Mr. Crum reported that based on the Minnesota state Department of Health study of census results the percentage of disabled persons' households living at the poverty level was nearly three times that of the nondisabled population, and the average individual earnings for disabled persons was 22.8% less than for nondisabled persons. Only 39.4% of people with disabilities work full-time on a year-round basis. At least as to the U.S. Census Department and the Minnesota State Department of Health statistics, these are matters of fact accepted as true by the Commission. Mr. Crum testified that according to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately $28,763 for male high school graduates. The average wage for a male worker with a bachelor's degree is $50,916. *R.* 183, *Vol.* 1.

In his April 7, 2016 follow-up report, *A.* 281-285, Mr. Crum reviewed the functional capacity evaluation conducted by Leah Padaca ATC-L who indicated:

> Based on the dictionary of occupational titles in the Department of Labor Mr. Oliveros is demonstrating the current capacity to work an eight-hour workday medium duty with occasional right-hand fine grasp. During the grip dynamometer, Mr. Oliveros supported the dynamometer on his leg when he did the first group this right hand, the rest he was able to hold the dynamometer without needing support. When doing standing tasks, Mr. Oliveros had a difficult time grabbing washers with his right hand.

*A.* 281. These are matters of fact accepted as true by the Commission.

Mr. Crum documented Mr. Oliveros's deficits as indicated by the functional capacity evaluation including a 5-pound grip/carry ability in his right upper extremity and no fine manipulation. Beth Rogers, MD declared Mr. Oliveros to medically stable on June 25, 2009, with a 53% permanent partial impairment the right upper extremity and a 32% permanent partial impairment rating of the whole person. Again, Dr. Rogers found that Mr. Oliveros had no history of pre-existing permanent physical restrictions that limited his activities. These are matters of fact accepted as true by the Commission.

Mr. Crum reviewed Claimant's educational history post-accident. Claimant obtained a GED, attended Lewis Clark State College for two semesters and one summer semester taking general business classes, started but withdrew from college at Western Idaho because he did not like their online method of instruction, attended Carrington College in 2012 for about two months in the pharmacy technology program but did not finish because of the cost of the daily commute, and earned a certificate of completion in pharmacy technology at the Milan Institute in Nampa Idaho in September 2012. *A.* 282-283. Claimant completed a one-month internship at Walgreens, though his hand injury made it difficult for him to count out pills at a production rate. Claimant failed the pharmacy technology certification Board test twice but indicated to Mr. Crum that planned to take the test again. In the meantime, he got a job with KeyBank. Mr. Oliveros believes that the training he received at Milan Institute and the Walgreens internship

was extremely beneficial in terms of his being able to obtain and perform the types of work he had done since he left that program. In particular, Mr. Oliveros stated that the customer service training in computer skills training that he received had been particularly marketable for him. *A.* 283. These are matters of fact accepted as true by the Commission.

Significantly, following the Milan Institute program, Mr. Oliveros was able to work as an account manager at TigerDirect earning $14.42 per hour plus 3% to 6% Commission, Medicap Pharmacy as a pharmacy technician at $14 per hour, the Terry Riley Clinic as a pharmacy technician for $13 an hour. *A.* 283-284. These are matters of fact accepted as true by the Commission.

Based upon the sources that he considered and Claimant's self-funded retraining and job history, Mr. Crum gave evidence that Claimant had done from an 80% reduction in labor market access (contained in his November 16, 2009 report, *R.* 183, *Vol* 1) to a 77% reduction in labor market access. *R.* 193, *Vol.* 1.[1] Mr. Crum reported that through education/retraining Claimant

[1] Mr. Crum's measurement of the percentage of the labor market access lost is a factual finding, as opposed to his opinion regarding the Claimant's percentage of permanent partial disability.

Mr. Crum stated in his April 2016 report:

> Certainly, Mr. Oliveros benefited from [retraining] in terms of significantly reduced labor market access as well as significant new marketable skills. The retraining also significantly reduced his level of permanent partial disability.
>
> Assuming Mr. Oliveros current level of education and skills (post retraining) assuming that a 55% loss of labor market access and a 0% loss of wage earning capacity, it would be appropriate to propose permanent partial disability inclusive of impairment of approximately 45% (aside PPI rating is 32% whole person.) The above level of disability would compensate (to a very minor degree) Mr. Oliveros for the loss of all the digits of his dominant hand, exclusive of the farm, and most especially the vocational difficulties this will cause him for the rest of his life. Mr. Oliveros is currently 25 years of age. Assuming a retirement date

Oliveros gained new computer and customer skills since his industrial accident which he used successfully in employment. As a result, by including jobs that required those additional skills, Mr. Crum revised Claimant's loss of access to the labor market down to approximately 55%. *A.* 284. These facts, relating to statistical loss of access to the labor market and not Mr. Crum's opinion of the percentage of permanent partial disability, are matters of fact accepted as true by the Commission.

Mr. Crum also stated:

> Through retraining, Mr. Oliveros has been able to significantly improve his post injury wage earning capacity. In the Boise area labor market, the average wage for Pharmacy Technicians is $15.57 per hour. The entry wage is $12.54 per hour. He is currently earning $11.75 per hour, with employer supported benefits. He anticipates that within a few months, he may earn as much as $14.00 per hour.

*A.* 285. These are matters of fact accepted as true by the Commission.

Mr. Crum's Opinions

Mr. Crum testified that in his opinion the only way that Mr. Oliveros could successfully mitigate the effect of his July 2008 industrial injury was through education. "Ideally Mr. Oliveros should seek a bachelor's degree. This would give them a better chance of being able to earn a good wage in the future. In my opinion, Mr. Oliveros will probably not be able to find a job in excess of approximately the federal minimum wage which is currently $7.25 per hour." *R.* 183, *Vol.* 1. Mr. Crum proposed a two-year retraining program to allow the Claimant to complete an Associate's degree in a compatible field.

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> of 2057 (if he retires at age 67), Mr. Oliveros still has approximately 40 years of work life ahead of him.

Mr. Crum stated his opinion in order to arrive at a reasonable and equitable disability opinion he considered Idaho Code § 72 - 425 defining disability and the pertinent nonmedical factors provided in I.C. § 72-430. These factors included disfigurement of a kind likely to handicap the employee in procuring and holding employment, the diminished ability of Mr. Oliveros to compete in an open labor market within a reasonably reasonable geographic area considering all of his personal and economic circumstances, the occupation of Mr. Oliveros at the time of injury, and his age at the time of injury. Mr. Crum concluded "in my opinion, the above retraining program should be considered Mr. Oliveros as the best means of mitigating the dramatic loss of function of all four fingers on his dominant right hand. Mr. Crum opined that without retraining, it is was his opinion that Mr. Oliveros would have a very difficult time finding and maintaining any sort of good paying job in his labor market. Mr. Crum concluded that without retraining, it was his opinion that Mr. Oliveros would reasonably experience permanent partial disability inclusive of impairment of approximately 75%." *R.* 178-184; (*A.* 273-279).

The Commission abused its discretion by adopting a percentage of permanent partial disability without a factual basis or the exercise of reason.

Despite the fact that "[a]ccess to a labor market is central to either method of demonstrating that a Claimant is totally and permanently disabled," *Brown* 608, 580, the Commission simply arbitrarily concluded that Claimant had lost access to no more than 30% of his labor market and had a permanent partial disability of 25% which was "subsumed" within his 32% whole person permanent impairment rating. *R.* 213-214, *Vol.* 2.

As stated above the uncontradicted testimony may not be arbitrarily disregarded by the Commission. ***Miller, supra.*** The Commission's *Findings of Fact, Conclusions of Law and Recommendation*, *R.* 195-215, while rejecting Mr. Crum's detailed analysis, contains no analysis

of how the Commission reached the foregoing conclusions regarding the loss of access to the labor market and permanent partial disability of 25%. These conclusions are simply drawn out of thin air, and therefore arbitrary and not arrived at through the exercise of reason. As such they are an abuse of discretion and do not justify disregarding Mr. Crum's testimony.

Mr. Crum calculated the cost of Mr. Oliveros's time loss benefits and direct costs associated with retraining at $42,921. *A.* 285.

The Commission erred as a matter of law in concluding that it was required to determine Claimant's permanent partial disability at hearing, after retraining for which the Commission held that Claimant was not entitled to reimbursement from Respondents.

Based on the foregoing facts, Claimant argued that it would be patently unfair to allow Defendants to sit idly by while Claimant, at his own expense, obtained the post-secondary education he needed to succeed in his employment, thus driving down his PPD rating, only to swoop in and use that additional education as a sword to slash Claimant's PPD benefits. Claimant argued that if Defendants are not required to reimburse Claimant for his "retraining" expenses, they should not get the benefit of relying on his resultant decreased PPD rating. Since Defendants do not have to reimburse Claimant for his educational expenses, Claimant asserted that the Commission should evaluate Claimant's PPD at the time of his reaching maximum medical improvement. *R.* 209, *Vol.* 2. Despite the fact that Claimant's access to the relevant labor market actually increased after obtaining additional education to become a pharmacy technician, the Commission held that *Brown, supra,* required it to use the labor market at the time of hearing in determining permanent partial disability. *R.* 210, *Vol.* 2.

> Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered.

*R.* 210, *Vol.* 2. However, this reading of *Brown* ignores this Court's caveat, applicable in this case:

> Granted, there may be instances where a market other than the Claimant's residence at the time of the hearing is relevant to the I.C. § 72-430(1) inquiry, and such determinations should be made on a case by case basis based on individual facts and circumstances. *See e.g. Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977) (court allowed evidence from market vacated by Claimant after injury as well as market of residence at the time of the hearing). *Davaz*, 125 Idaho at 337, 870 P.2d at 1296.

*Brown,* 609, 581. The Commission failed to recognize that the time at which PPD had to be evaluated was an act of discretion, thereby abusing its discretion.

Though this Court has yet to rule on this issue, Claimant contends that the Commission erred as a matter of law in measuring his permanent partial disability as of the date of the hearing, almost nine years after his industrial accident and after retraining that Claimant paid for himself. This follows logically from the fact that I.C. § 72-430 requires the Commission to determine permanent partial disability "consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee." If the Commission's decision in this case stands, giving the benefit of retraining to Respondents but not requiring them to reimburse Claimant for the cost of that retraining, what incentive is there within the Idaho Workers Compensation Act for a Claimant to better himself at his own expense through education in a protracted case? Would the Claimant in such a case not be better off going through the lengthy and expensive process of piecemeal hearings on retraining and disability rather than taking the initiative of retraining himself and seeking reimbursement at the disability hearing as Claimant has here? Certainly, this interpretation of the Act does not comport with the requirement that the provisions of the workers'

compensation law be liberally construed in favor of the employee, to provide sure and certain relief for injured workers and their families and dependents. I.C. § 72-201, *Davaz, infra.*

**4. Retraining**

Following his industrial accident, Claimant had a permanent impairment rating of 32%. *R.* 198 *Vol.* 2. At the time of his industrial accident, July 30, 2008, Claimant had not yet graduated from high school. In addition to his high school studies, Claimant worked part-time in a fast-food restaurant, earning between $7.00 and $7.50 per hour. *R.* 198 *Vol.* 2. After being denied retraining benefits by Respondents, Claimant took out loans and completed a course of study to become a pharmacy tech. This program was highly successful. About two months after obtaining his PT certificate, Claimant found work at Terry Reilly Pharmacy in Nampa as a PT. His starting salary was $11.80 per hour, with paid medical, vision, and dental benefits after two months. Claimant worked for Terry Reilly Pharmacy for two years. *R.* 200 *Vol.* 2. In December 2016, Claimant found employment with Albertsons Pharmacy's corporate offices in Boise. At the time of the hearing on February 22, 2017, Claimant worked as a third-party coordinator for Albertsons, where he processes claims for pharmacies when there are issues at the point of purchase. Claimant continued to be employed in this position at the time of the hearing. His hourly wage is $15.87 plus health, dental, vision, and 401(k) benefits after three months. Claimant enjoys working there and plans on staying with Albertson's long-term if possible. After one year of employment, there are multiple opportunities for advancement with the company. *R.* 200 *Vol.* 2. While Mr. Crum concluded in his initial report that Claimant had sustained a permanent partial disability of 75%, *R.* 184, *Vol.* 1, he concluded in his updated 2016 report that through retraining Claimant had reduced his permanent partial disability to 45%. *R.* 194, *Vol.* 1.

The Commission erred as a matter of law in holding that a Claimant must have had an "established 'field, skill or vocation' at the time of his accident to be eligible for retraining benefits under I.C. § 72-450.

Nevertheless, the Commission held that Claimant's retraining was not reimbursable under I.C. § 72-450. The Commission erred as a matter of law in holding that a Claimant must have had an "established 'field, skill or vocation' at the time of his accident from which he was thereafter precluded by his injuries" in order to be eligible for retraining benefits." *R.* 202, *Vol.* 2. I.C. § 72-450 contains no such express requirement. As for any argument that contains an implied requirement to that effect, this Court's prior cases blunt that argument:

> More specifically, we must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated. *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 721, 779 P.2d 395, 396 (1989). The purpose of the workers' compensation law is to provide sure and certain relief for injured workmen and their families and dependents. I.C. § 72-201.

*Davaz v. Priest River Glass Co.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296, (1994).

Even if I.C. § 72-450 did contain a requirement that a Claimant must have had an "established 'field, skill or vocation' at the time of his accident to be eligible for retraining benefits," the Commission held:

> For starters, Claimant did not have an established "field, skill, or vocation" at the time of his accident from which he was thereafter precluded due to his injuries. Arguably, Claimant's time-of-injury skills centered on working for fast food establishments while going to school. After the accident, he returned to the fast food industry, at least temporarily. Thus, he proved he could still pursue those skills required to work at a fast food restaurant. His one plus day's experience at Rule Steel did not imbue Claimant with skills, was not his chosen field, and was never considered by him to be a place where he intended to pursue his vocation. Instead, both pre- and post-accident, Claimant had aspirations to attend college after high school. Claimant's fulfilled desire of attending institutions of higher learning after high school hardly fits the common definition of "retraining into a different field, skill, or vocation.

*R.* 202, *Vol.* 2. Emphasis supplied. It was an error of law for the Commission to hold that Claimant's pre-injury aspirations disqualified him from retraining benefits under I.C. § 72-450.

The Commission erred as a matter of law in holding that Claimant's work at fast-food establishments was not a "field," "skill," or "vocation" under I.C. § 72-450

The Commission erred as a matter of law in holding that Claimant's work at fast-food establishments was not a "field," "skill," or "vocation." The Commission erred as a matter of law in concluding "For starters, Claimant did not have an established "field, skill, or vocation" at the time of his accident from which he was thereafter precluded due to his injuries." *R.* 202, *Vol.* 2. Ballantine's Law Dictionary defines "vocation" as "A trade, profession, occupation, or calling, whether lawful or unlawful" (Citing 43 ALR 800; 50 ALR 1176.) and "skill" as "Ability; proficiency. Knowledge coupled with the ability to apply it." Certainly, Claimant had the knowledge and ability to perform the work that he did while in high school at fast-food restaurants. The Dictionary of Occupational Titles, 311.472-010, defines "Fast-Foods Worker" and sets forth the skills required to do that job. Indeed, the Commission itself referred to Claimant's pre-injury work as involving "skills":

> Arguably, Claimant's time-of-injury skills centered on working for fast food establishments while going to school. After the accident, he returned to the fast food industry, at least temporarily. Thus he proved he could still pursue those skills required to work at a fast food restaurant.

*R.* 202, *Vol.* 2. Emphasis supplied. Finally, the only evidence admitted during the 2017 hearing regarding skills was provided by Claimant's vocational expert, Douglas Crum:

> Mr. Oliveros's work history, education and experienced have resulted in a modest set of residual transferable vocational skills to lighter employment. Mr. Oliveros has a narrow range of employment experience. He has yet to graduate from high school. Mr. Oliveros's injury occurred before he had a chance to begin a career.

*A.* 279. Emphasis Supplied.

Claimant's time-of-injury work involved working part-time for fast food establishments while going to high school. No one could seriously call that experience a "field, skill, or vocation." The Commission found that after the accident, he returned to the fast food industry, at least temporarily. *R.* 202, *Vol.* 2. Thus, it concluded, that Claimant proved he could still pursue those skills required to work at a fast food restaurant. This conclusion was not based on substantial evidence. Claimant's actual testimony at hearing on this point was as follows:

> Q. So when you had your accident at work on July 30, 2008, and you lost -- had the traumatic amputation of portions of four fingers on your right hand; is that correct?
>
> A. Correct.
>
> Q. Now, are you right-hand dominant or left-hand dominant?
>
> A. I'm right-hand dominant.
>
> Q. So after you had that accident, what kind of work did you have?
>
> A. At the time of the accident or afterwards?
>
> Q. Afterwards.
>
> A. After? I did Dairy Queen for a couple of months. Also at WDS, I worked there for a couple of months.
>
> Q. Okay. Let me take you through those, to begin with. First of all, I think that it is in the record that your time -- at the time of your injury, you were still in high school, and you were earning $7 an hour; is that correct?
>
> A. Correct.
>
> Q. Were you working a 40-hour week, then, while you were in high school or was it --
>
> A. No.
>
> Q. -- part-time?
>
> A. Part-time.
>
> Q. And when you went back to work at Dairy Queen in April of 2008, tell us what kind of work you were doing.
>
> A. Just cashier, working the drive-thru, fast food -- fast-food place, so just nothing -- nothing heavy, just -- other than that.
>
> Q. And you worked there into July of 2008; is that correct?
>
> A. Correct.
>
> Q. Now, did the loss of -- partial loss of four fingers on your dominant hand interfere in any way with your ability to do the work at Dairy Queen?

A. Yes.

Q. Will you explain how.

A. Just after that the accident, I mean, I had a cast on, so, obviously, I was learning on how to use my left hand more, as in picking up stuff, grabbing stuff, using the cashier, just anything that -- that has to do of using my right hand. I, you know, obviously, at the time, I was learning on how to use my left hand for that kind of stuff. So I felt like it was -- it did, you know, disturb me.

Q. From your point of view as a layperson -- and I'm asking you now just in terms of your own perception, it's not anything that you may have heard from an expert, such as the doctors in this case -- how has the injury to your dominant hand affected your ability to use the hand for things that require, you know, normal fingers and grip and things like that?

A. I'd say it affected it in many ways. I mean, pretty much anything I do in life it can affect it. My job-wise, physically-wise, just going out, you know, people are asking what happened, and it's not just my hand, it's also the scar. So I have to pretty much hide it. Just gripping, you know, any kind of small stuff, like a screwdriver or a little nail. Heavy stuff, also, I always have to support with my left hand. Just pretty much anything I do it's affected.

*Oliveros Depo.* p. 30, l. 20 -33 l. 8. *A.* 238.

The Commission erred as a matter of law in holding that a Claimant has no permanent disability if the Claimant can return to his or her time-of-injury job in a limited capacity.

The Commission also erred as a matter of law in holding that proof that Claimant could return to working at a fast-food restaurant in a limited capacity meant that he had no permanent disability. The import of this conclusion is that the Commission focused on Claimant's pre-accident skills, as opposed to Claimant's diminished ability to compete in an open labor market within a reasonable geographical area considering all his personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. I.C. § 72-430.

Regarding the Claimant's self-financed retraining to become a pharmacy technician, the Commission also erred as a matter of law in concluding, "both pre- and post-accident, Claimant had aspirations to attend college after high school. Claimant's fulfilled desire of attending institutions of higher learning after high school hardly fits the common definition of "retraining into a different field, skill, or vocation." *R.* 202, *Vol.* 2. Claimant is not aware of any authority

supporting either of those propositions; propositions which the Idaho Industrial Commission considered to be the law.

The Commission erred as a matter of law in holding that I.C. § 72-450 does not encompass retraining to restore access to the relevant labor market.

The Commission also erred as a matter of law in construing I.C. § 72-450. The Commission held:

> The next issue confronting Claimant as regards the language of the statute in question is the fact that he did not need retraining in order to restore his previous earning capacity. At the time of his accident, Claimant had a minimum wage earning capacity. Had he not been injured, there is no proof Claimant, without further education, would have likely started his post-high school career at anything other than a low to minimum wage job. While his further education certainly enhanced his earning ability, Claimant's earning capacity was not seriously undermined by his industrial accident, as admitted by Claimant's vocational rehabilitation expert.

*R.* 203 *Vol.* 2. While I.C. § 72-450 does use the term "earning capacity," and while Claimant's expert did state that he had not loss of earning capacity resulting from his accident (as opposed to loss of access to his labor market) common sense compels the conclusion that retraining also applies to restoring access to a labor market. This Court's recent decision in ***Marquez v. Pierce Painting, Inc***., 164 Idaho 59, 423 P.3d 1011, (2018) reinforces the requirement that the Commission liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated, that being to provide sure and certain relief for injured workmen and their families and dependents. (

> A construing court's primary duty is to give effect to the legislative intent and purpose underlying a statute. Moreover, the court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the [L]egislature. It is incumbent upon the court to give the statute an interpretation that will not deprive it of its potency. In construing a statute, not only must we examine the literal wording of the statute, but we also must study the statute in harmony with its objective. (citations omitted). Thus, we review the Act according to its plain meaning, while not losing sight of its "potency."

Emphasis supplied. ***Marquez, supra***. See, also, I.C. § 72-201, *Davis, supra*)

The Commission erred as a matter of law in holding that to qualify for retraining benefits under I.C. § 72-450 a Claimant must have been trained in a career at the time of injury.

In denying Claimant retraining benefits, the Commission erroneously concluded as a matter of law that retraining does not include training for an individual who has not previously been trained in a career.

> The Referee, but not the Claimant, uses quotation marks around the word retraining, since the undersigned cannot legitimately call Claimant's post-secondary education retraining. Retraining implies Claimant was previously trained in some career, and had to be retrained, *i.e.* trained again, due to the accident in question. Technically, while Claimant obtained work-skill training post-accident, he did not receive retraining in the popular sense of the word.

*R.* 196 *Vol.* 2. Emphasis supplied. There is no basis for this holding in I.C. § 72-450.

The Commission erred as a matter of law in holding that I.C. § 72-450 contains a "but for" requirement.

In this case, the Commission erred as a matter of law in holding:

> [I]t appears Claimant's post-secondary education was not directed by his injury. Claimant had a vision of continuing his education after high school even before his accident. There is nothing in the record to establish that "but for" the accident, Claimant would have chosen a different path after high school. To his credit, Claimant did not abandon his pre-accident goals because of his permanent disability, but rather found a way to achieve them in spite of his disability. Unfortunately, within the parameters of the Act, there is no provision for rewarding individuals like Claimant who pull themselves up after a life-changing accident. To require Defendants to pay for schooling that was part of Claimant's preinjury planning even without the accident is not proper.

*R.* 204, *Vol.* 2. Emphasis supplied.

The Commission erred as a matter of law in holding that an injured worker is not entitled to retraining if, prior to the worker's accident, he had aspirations to improve himself through education.

The Commission also erred as a matter of law in holding that an injured worker is not entitled to retraining if, before the worker's accident, he had aspirations to improve himself through education. This misconstruction goes to the heart of the Commission's determination

that plaintiff suffered no permanent partial disability beyond his 32% physical impairment – a conclusion which seems to be drawn out of thin air given the Commission's rejection of the portions of the testimony of Douglas Crum that supported Claimant's case, and the lack of any other evidence in the record supporting this finding. Indeed, with the exception of his part-time work at Dairy Queen (see p. 20 below) and one job at a call center that lasted a few months, after his industrial accident, Claimant "unsuccessfully sought work at numerous banks for a teller position, at call centers, and for jobs operating machines." *R.* 199, *Vol.* 1.

In this case, the Commission erred by not considering Claimant's retraining in determining his permanent partial disability:

> We first address Claimant's argument that the Commission erred in denying him retraining benefits. If Campbell is correct that the Commission erred in this regard, then other parts of the Commission's order relating to the amount of the award for permanent partial disability are also affected. I.C. § 72-450 states that during the period of retraining "the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case may be." It is only after the retraining is completed that the employee is to be rated for permanent disability. Accordingly, if the Commission erred in analyzing the claim for retraining benefits, it could affect the permanent disability award as well.

*Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 613, 778 P.2d 731, 735, (1989). Emphasis supplied. The Commission erred as a matter of law in concluding that an individual who finances his own retraining is not entitled to retraining benefits under I.C. § 72-450, which permits the Commission to "authorize or order such retraining." The Commission held:

> 24. In the present case, Claimant was at a cross roads (*sic.*) when confronted with his postinjury permanent disability and no real work skills. He could have lamented his condition, maximized his perceived disabilities and focused on what he could not do. Conversely, Claimant could have resolved to not let his injury define him. Faced with these alternatives," Claimant chose to discover his capabilities, adapt to his situation, further his education, and strive to make a life for himself and his new family. In the process, he incurred substantial educational expenses.

25. Defendants concede that Claimant overcame his obstacles, gained a useful education, obtained work, and started what hopefully will be a successful career. However, they argue that Claimant did exactly what he wanted to do even before his accident - get college training and transition that education into a career. Defendants should not be required to pay for Claimant's education when it was not pursued as an alternative to what he would have done but for his injuries. Defendants' obligation is defined statutorily, not charitably or equitably.

26. While both positions on this issue have merit, and while the liberal construction of the Act should not automatically preclude reimbursement of training expenses in this unique situation, nevertheless it appears Claimant's post-secondary education was not directed by his injury. Claimant had a vision of continuing his education after high school even before his accident. There is nothing in the record to establish that "but for" the accident, Claimant would have chosen a different path after high school. To his credit, Claimant did not abandon his pre-accident goals because of his permanent disability, but rather found a way to achieve them in spite of his disability. Unfortunately, within the parameters of the Act, there is no provision for rewarding individuals like Claimant who pull themselves up after a life changing accident. To require Defendants to pay for schooling that was part of Claimant's preinjury planning even without the accident is not proper.

27. Claimant has failed to prove he is entitled to retraining benefits for his postsecondary education.

*R.* 203-204, *Vol.* 2. The Commission's conclusion that "within the parameters of the Act, there is no provision for rewarding individuals like Claimant who pull themselves up after a life-changing accident" is an error of law.

The Commission erred as a matter of law in basing its decision on its assumptions about Claimant's starting wage after high school rather than Claimant's relevant labor market.

The Commission erred as a matter of law in basing its decision on the premise that "Had he not been injured, there is no proof Claimant, without further education, would have likely started his post-high school career at anything other than a low to minimum wage job." *R.* 202, *Vol.* 2. The issue is not what Claimant would have started at had he not had his accident, but what his labor market was after the accident. The proper comparison is between his status post-accident and after retraining. There is no proof that even after the initial accident, Claimant had

the same labor market as he did pre-accident. Indeed, the only evidence on this point was provided by Mr. Crum in his first report before retraining:

> I have performed an evaluation of Mr. Oliveros' pre- and post-injury labor market access, using the Boise metropolitan statistical area labor market. This labor market is comprised of Ada and Canyon Counties. Based on this analysis, considering Mr. Oliveros' pre-injury education, language skills, vocational skills, work history, and presumed pre-injury capacity for medium to heavy work it appears that Mr. Oliveros had access to approximately 7.3% of the jobs in the labor market. Repeating the above analysis by factoring in the functional limitations caused by amputation of all 4 fingers of Mr. Oliveros' dominant right hand, considering the restrictions given by Dr. Gross, it appears Mr. Oliveros has access to approximately 1.4% of the jobs in this labor market. This represents an 80% reduction in labor market access.

*R.* 182-183, *Vol.* 1.

> At the time of the subject injury, Mr. Oliveros was between his junior and senior years of high school, performing a summer job. Mr. Oliveros' time-of-injury position paid $7.00 per hour on a full-time basis. As far as I know, Mr. Oliveros did not receive any employer-supported benefits. In my opinion, it does not make sense to use the time of injury wage Mr. Oliveros as a baseline for a pre and post-injury wage-earning capacity comparison. According to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately $28,763 for male high school graduates. The average wage for a male worker with a bachelor's degree is $50,916. As a result of the subject industrial injury, Mr. Oliveros will not be able to perform jobs similar to the work his father performs, i.e. manual laboring positions. He simply does not have the manual dexterity to do those kinds of jobs. According to the Minnesota State Department of Health in a study of census 2000 results, the percent of disabled persons households who lived under the poverty level was nearly 3 times that of non-disabled populations (15% vs. 6%); average individual earnings for disabled persons was 22.8% less ($26,978 vs. $34,951). The percentage of persons with disabilities who are not working was more than twice as high as individuals with no disabilities. Only 39.4% of people with disabilities worked full time on a year round basis. The poverty rate for person with disabilities was noted to be twice as high as the poverty rate for adults without disabilities. The report goes on to indicate that people with disabilities find it more difficult to complete post-high school education because they have less earning capacity than their peers. There is no doubt that the severe injuries to Mr. Oliveros' dominant hand will severely impact his vocational options for the rest of his life.

*R.* 183, *Vol.* 1.

## CONCLUSION

Claimant has lost all the way around in this tragic case. Initially, he was denied the partial finger prosthetics he needed as a high school student to deal with the psychological effects of the disfiguring partial amputation of four of his fingers. Next, he was denied reimbursement for retraining that actually benefited the Respondents. Finally, he was not awarded a penny for his loss of access to the labor market.

To an extent, Claimant received nothing as a result of his 2017 hearing, because the Commission failed to follow the precedent laid down by this Court in *Corgatelli* and *Davis*. It should be obvious that the compensation that one receives for permanent impairment resulting from the loss of a body part, is not the loss of access to the labor market compensable contemplated by I.C. § 72-423, which states, "'Permanent disability' or 'under a permanent disability' results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected." Under I.C. § 72-425, Permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity <u>as it is affected by the medical factor of permanent impairment</u> and by pertinent nonmedical factors. "Affected by" is not synonymous with "including."

The decision of the Commission is riddled with errors of law that undermine virtually every finding it made in this case. Further, the Commission abused its discretion in multiple ways, as described above. The Commissions conclusions of law were not supported by substantial and competent evidence.

The decision of the Commission on the issues of retraining and the extent of permanent atrial disability should be reversed, and this case should be remanded for reconsideration consistent with *Corgatelli* and *Davis*, and instructions which this Court should give regarding the proper construction of the relevant sections of the Idaho Worker's Compensation Act discussed herein.

Respectfully submitted September 27, 2018.

/s/ Wm. Breck Seiniger, Jr.
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**CERTIFICATE OF SERVICE**

On September 27, 2018, I served the foregoing by facsimile transmission on:

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